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IT HAS LONG BEEN RECOGNIZED that a privilege to act is a perfect defense to liability for a non-consensual, intentional interference with another person. This privilege is based upon self defense,[1] defense of third persons,[2] mistake,[3] or various other recognized legal theories. Even a state may have a privilege to interfere with the person of a citizen, and this privilege may extend to an interference to provide an infant citizen with medical care without the consent of, or against the express wishes of, the parent or guardian.

Perhaps the most highly publicized modern, non-consensual, *emergency* medical care case is *State v. Perricone*.[4] This case involved the state's privilege to order an emergency blood transfusion for an infant who would undoubtedly either die or be mentally impaired without it, against the express wishes of the infant's parents, who were Jehovah Witnesses. The New Jersey State Supreme Court, in affirming the trial court's decision while an appeal was pending in the Appellate Division, held that under the New Jersey Child Neglect Statute,[5] the infant was a neglected child, and the state was privileged to interfere with emergency medical care. The Supreme Court of New Jersey, in the *Perricone* case, raised but did not decide the further question of whether a state is privileged to interfere with non-emergency (corrective or preventive) medical care of infant citizens:

> True, not every refusal to consent to treatment for an infant constitutes evidence of unfitness or neglect to provide proper protection. For example, refusals to permit corrective surgery for a congenital arm deformity (*In re Hudson*, 13 Wash. 2d 673, 126 P. 2d 765 (Sup. Ct. 1942)) and to correct rachitis (*In re Tuttendario*, 21 Pa. Dist. 561 (Q. S. Phila. Co. 1911)) have been held insufficient grounds for taking custody from the parents.[6]

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1 Fraguglia v. Sala, 17 Cal. App. 2d 738, 62 P. 2d 783 (1936).

2 Frew v. Teagarden, 111 Kan. 107, 205 P. 1023 (1922).

3 Keep v. Quallman, 68 Wis. 451, 32 N.W. 233 (1887).

4 State v. Perricone, 37 N.J. 463, 181 A. 2d 751, cert. denied 371 U.S. 890 (1962); Note, Parent and Child—State's Right to Take Custody of a Child in Need of Medical Care, 12 DePaul L. Rev. 342 (1963).

5 The statute applicable to this matter, N.J.S.A. 9:2-9, reads as follows:

> When the parents of any minor child or the parent or other person having actual care and custody of any minor child are grossly immoral or unfit to be intrusted with the care and education of such child, or shall neglect to provide the child with proper protection, maintenance and education, * * *; it shall be lawful for any person interested in the welfare of such child to institute an

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It is this delicate issue, which was raised but was neither fully discussed nor decided in the *Perricone* case, that is currently the subject of controversy and apparent conflict.

Basis of the States' Privilege to Interfere with Medical Care of Infant Citizens

The state is not privileged at common law to interfere with the person of an infant citizen by taking custody of the infant for failure of the parents to provide adequate medical care, either in emergency or non-emergency.[7] This is true even though the state, in its role as *parens patriae,* is responsible for the care of infants within its jurisdiction,[8] and even though the parents have a common law duty to provide their infant children with necessaries which may include medical attention.[9]

In the absence of any common law privilege to remove the custody of infant children from parents to provide medical care, the states at first indirectly exerted their coercive power to compel parents to provide adequate medical care for their infant children by enacting criminal penal statutes.[10] These criminal statutes had the obvious deficiency of

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action in the Superior Court or the Juvenile and Domestic Relations Court in the county where such minor child is residing, for the purpose of having the child brought before the court, and for further relief provided by this chapter. The court may proceed in the action in a summary manner or otherwise.

[6] State v. Perricone, *supra,* note 4 at 471-472, 181 A. 2d at 759-760.

[7] People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903); In re Rothowitz, 175 Misc. 948, 25 N.Y. Supp. 624 (1941); compare People ex. rel. O'Connel v. Turner, 55 Ill. 280 (1870) (fathers given power of life and death and sale over the children under early Roman law).

[8] Garnder v. Hall, 132 N.J. Eq. 64, 26 A. 2d 799 (Ct. of Chan. 1942); People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769, cert. denied 344 U.S. 824 (1952); But see In re Tuttendario, 21 Pa. Dist. 561 (Quar. Sess., Phila. Co. 1911); Wade v. State, 39 Wash. 2d 744, 238 P. 2d 914 (1951).

[9] Potter v. Thomas, 164 N.Y. Supp. 923 (1917); Osborn v. Weatherford, 27 Ala. App. 258, 170 So. 95 (1936); Greenspan v. Slate, 22 N.J. 344, 92 A. 2d 47 (1952); People v. Pierson, *supra,* note 6; Hopkins v. Commissioner of Internal Revenue, 144 F. 2d 683 (6th Cir., 1944); In re Marsh, 140 Pa. Sup. 472, 14 A. 2d 368 (1940); 1 Blackstone, Commentaries, § 447; 67 C.J.S. Parent and Child, § 15(a) (1950); 39 Am. Jur. Parent and Child § 47 (1942); But see Bazeley v. Forder, L. R. 3 Q.B. 559 (1868); Cissna v. Beaton, 2 Wash. 2d 491, 98 P. 2d 651 (1940) (parent under no common law obligation to support child).

[10] Regina v. Wagstaffe, 10 Cox C.C. 530, 32 J.P. 215 (Cent. Crim. Ct. 1868) (parent could not be convicted of a crime for refusing on religious grounds to provide medical care for infant in the absence of a statutory provision); England's Children Act of 1908 (8 Edw. 7, c. 67) § 12, subs. 1, provided that any parent who neglects his child "in a manner to cause injury to the child's health," is "guilty of a misdemeanor," and further that failure to provide "adequate medical aid" for his child "shall be deemed to have neglected him in a manner likely to cause injury to his health." See also People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (Ct. of App. 1903) for a discussion of an early New York Penal Code providing that:

> A person who (1) wilfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter, or medical attention to a minor, . . . is guilty of a misdemeanor.

punishing the guilty parent only after the harm, which was often irreparable, had befallen the unfortunate child.

Although a parent is under no common law duty civilly enforceable by a state to provide his infant children with proper medical care, this harsh rule has been changed by modern statutes throughout the United States. These statutes are based upon the police power of the state to provide for the health, welfare, safety and morals of its citizens, and it is so well established that these statutes represent a legitimate exercise of that power that they may no longer be questioned on this basis.[11] These statutes vary greatly in their terms from state to state, but in the final analysis they are nonetheless surprisingly uniform in their scope and effect. Generally, these civil statutes contain provisions for the court to deprive a parent of the custody of his infant child when the infant is "neglected," "dependent," or when the parent has failed to provide "necessaries." [12]

There can no longer be any doubt that these statutes are constitutional and do not conflict with the First Amendment guarantee of freedom of religion.[13] As stated in the *Perricone* case:

> Thus the amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.
>
> The right to practice religion freely does not include the liberty to expose . . . a child . . . to ill health or death. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[14] (Citations omitted.)

It is interesting to note that, although acting on religious beliefs is not an acceptable defense for parents failing to provide proper medical care for infant children, faith healing has been recognized in some criminal child neglect cases as a defense to criminal liability for failing to provide

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[11] Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358 (1904); In re Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933); State v. Perricone, 37 N.J. 463, 181 A. 2d 751, cert. denied 371 U.S. 890 (1962); Prince v. Massachusetts, 321 U.S. 158 (1944); Mitchell v. Davis, 205 S.W. 2d 812 (1947); cf. 39 Am. Jur. Parent and Child § 15 (1942); cf. Jacobson v. Massachusetts, 25 S. Ct. 358 (1904) (compulsory vaccination permissible under doctrine of self-defense).

[12] Annot., 30 A. L. R. 2d 1138. The following statutes are representative of those found throughout the United States: Ill. Rev. Stat. § 23 2001-15 (1961); Mo. R. S. §§ 211.010 to 211.300 (1949); N.J.S.A. §§ 9:2-9 to 9:2-11 (1948); N.D. Rev. Code § 27-1608 (1943); Ohio Rev. Code § 2151.03 (1953); Wash. Rem. Rev. Stat. § 1987-1 *et seq.;* Wyo. Comp. Stat. Ann. 14-29 (1958).

For a particularly thorough and enlightening discussion of the Ohio statute, *see* 1951 Opinions of the (Ohio) Attorney General 689.

[13] Jacobson v. Massachusetts, 197 U.S. 11 (1904); In re Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933); State v. Perricone, *supra* note 4 at 468-469, 181 A. 2d at 756-757; Note, *op. cit. supra* note 4.

[14] State v. Perricone, *supra* note 4; Hoener v. Bertinato, 67 N.J. Super. 517, 171 A. 2d 140 (Juv. and Dom. Rel. Ct. 1961); People v. Pierson, *supra* note 6.

infants with proper medical care,[15] and in some civil cases as a consideration for determining whether parents have exercised reasonable care in protecting the recovery of their injured child.[16]

In view of these statutes, the question of a state's privilege to order corrective or preventive *non-emergency* medical care for infant citizens becomes one of judicial interpretation of the applicable state statute.

Argument in Opposition to Extending the Privilege to Non-Emergency Medical Care

The arguments presented in support of the proposition that the state is not privileged to interfere with corrective or preventive *non-emergency* medical care of its infant citizens without the consent or against the will of its parents is well reasoned and authoritative.

The age-old maxim that statutes in derogation of the common law are to be strictly construed gives heavy support to this proposition. Since these so-called "child neglect statutes" impose a burden upon the parents which they did not suffer at the common law,[17] the terms "neglected," "dependent," and "necessaries" should be narrowly defined. This was recognized in *Justice v. State,*[18] which held that a father who refused to provide medical care for any of his children was not guilty of a crime under a penal statute making it a misdemeanor to deprive children of a "necessary sustenance." The court reasoned that, although food, clothing and shelter could each be considered a "necessary sustenance," medical care was not, since it is not a common necessity of survival.

Another early case arising out of a coercive, penal child neglect statute is *In re Tuttendario,*[19] a case arising out of the Pennsylvania Act of June 11, 1879, P.L. 142, providing that "any person . . . who shall . . . wilfully abandon or neglect [an infant or minor child] . . . shall be guilty of a misdemeanor." The parents of a seven-year old boy who was suffering from a deformity known as rickets, and who could probably be cured

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[15] Trescher and O'Neil, Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist, 109 U. Pa. L. R. 203 (1960-61) (argument based upon public acceptance of faith healing as medical care); Cawley, Criminal Liability in Faith Healing, 39 Minn. L. R. 48 (1954); But see Craig v. State, 220 Md. 590, 155 A. 2d 684 (Ct. of App. 1959); People v. Pierson, 176 N.Y. 203, 68 N.E. 246 (Ct. of App. 1903) stating:

> We think therefore, that the medical attendance required by the (penal) Code is the authorized medical attendance prescribed by the statute (attendance by registered physician).

[16] Lange v. Hoyt, 144 Conn. 593, 159 A. 578 (1932), stating:

> . . . courts cannot disregard theories as to proper curative method held by a large number of reasonable and intelligent people. [Christian Scientist parent found not to have exaggerated the injured condition of his infant child, struck by an automobile, by delaying to furnish medical attention].

[17] *Supra* note 9.

[18] Justice v. State, 116 Ga. 605, 42 S.E. 1013 (1902).

[19] *Supra.* note 8.

by an operation but who would be a cripple all of his life and unable to provide for himself without an operation, refused to consent to the operation. The parents, who had suffered the early deaths of seven of their ten children, exercised a good faith belief that the child might not survive the operation. In holding that the parents were not guilty under the aforementioned penal statute, the court reasoned that the mere failure to provide medical care without a "malicious intent" was not "neglect" under the penal statute, and that the court could not supersede the parents' good faith judgment, even though the boy would be rendered a permanent cripple, since there is always some probability that a child will die from an operation. In reaching this conclusion, the court reasoned that:

> We have not yet adopted as a public policy the Spartan rule that children belong not to their parents, but to the state. As the law stands, the parents forfeit their natural right of guardianship only in cases where they have shown their unfitness by reason of moral depravity.[20]

The first authoritative modern case arising under a civil child neglect statute is *In re Hudson*.[21] Patricia Hudson was born with a congenital deformity consisting of an abnormal growth of her entire left arm, which made that arm larger and longer than the right arm and rendered it absolutely useless. The child appeared to be frail and suffering from the effects of this enormously heavy, useless extremity, which the doctors advised should be removed. Her heart was burdened by reason of having to pump blood to the large left arm and her chest was becoming deformed from carrying the enormous weight, but perhaps the greatest burden to her was psychological. There was no effective medical treatment other than amputation of the left arm, and the operation would entail a fair degree of risk of life. The child's father, the child herself, and all concerned desired the operation, except for the mother, who was the dominating parent in that particular family and who wanted to wait until the child could make the decision for herself.

The court concluded that under the applicable statute,[22] the state

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[20] *Ibid.* at 563.

[21] 13 Wash. 2d 673, 126 P. 2d 765 (1942).

[22] The pertinent language of the statute, Wash. Rem. Rev. Stat. § 1987-1 et seq., defining the jurisdiction and power of the Juvenile Court, reads as follows:

> The words "dependent child" shall mean any child under the age of 18 years:
> (6) who is destitute; * * *
> (7) whose home by reason of neglect, * * * of its parents or either of them * * * is an unfit place for such child, * * *
> (13) whose father, mother, guardian, or custodian * * * do not properly provide for such child, and it appears that such child is destitute of a suitable home * * * or where such child is without proper means of support; * * *
> (18) * * * all delinquent and dependent children within the state shall be considered wards of the state and their person shall be subject to the custody, care, guardianship and control of the court as hereinafter provided.
> See also, Rev. Code of Wash. § 13.04.010 (1956).

was not privileged to interfere with such non-emergency medical care against the express wishes of the dominating parent. In reaching this conclusion, the court reasoned that other cases had held that people were not required to mitigate damages in personal injury actions by subjecting themselves to risky operations. The court also placed heavy reliance upon the fact that the analogous criminal statute made it a misdemeanor for failing to provide medical care to a child under the age of 16 years, and reasoned that since the legislature had not provided a similar provision for the Juvenile Court law, they must have intended no such provision.

A dissenting opinion[23] took issue with the majority, and reasoned that the civil and criminal statutes are separate entities enacted by the legislature at different times and should not be interpreted in view of one another.

The obvious question to be asked is, why didn't the court rely upon provisions 7 and 13 of the statute and hold that the child's home was unfit or that the child was not properly provided for? It is apparent that two practical, if not legalistic, reasons may be advanced for this. First, the majority opinion severely criticized the father for shirking his duty to be the head of the household, and the mother for shifting the responsibility of the decision to her daughter, in an obvious attempt to shame the father into consenting to the operation. The second reason might be that the court was suffering under the erroneous impression that since everyone except the child's mother was desirous that the child be required to undergo an operation that she might not survive, "implicit in their position is their opinion that it would be preferable that the child die instead of going through life handicapped by the enlarged, deformed left arm." If this implication were true, it might present a logical reason for the decision. However, it is clearly in error, since the only thing that may be implied from desiring the child to undergo the operation is that it is preferable that the child submit herself to the chances of the operation rather than to go through life handicapped with the deformed left arm.

The next modern case following *In re Hudson* is *In re Frank*,[24] which arose under the same statute. The maternal grandmother of the child desired to have the child declared dependent and custody given to her

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[23] *Supra* note 21, 126 P. 2d at 792, where the dissenting opinion concluded that:

> The welfare of Patricia Hudson depends that the operation be performed as ordered by the trial court. Patricia is entitled to be put under a condition where she can run and play, attend public school, and take part in school activities. She is entitled to a healthy body, to secure a good education, to take her place in American society, to grow up as a normal American girl, to get married, and to have a home and children. Without an operation, all these things are denied to her and she is condemned to travel along life's pathway a hopeless cripple, an object of pity dependent upon either private or public charity.

[24] 41 Wash. 2d 294, 248 P. 2d 553 (1952).

on the ground that the child had a speech impediment and that the father had neglected to provide proper medical care. The trial court, apparently in direct defiance of the prior decision rendered in *In re Hudson,* found the child dependent and took custody away from the father. On appeal to the Washington Supreme Court, the trial court decision was reversed, the court reasoning that the child was not dependent, since the father had no obligation to furnish medical attendance. Placing principal reliance on *In re Hudson,* the court again reasoned that ". . . the Juvenile Court law excludes from its provisions a requirement to furnish medical or surgical care, while in the penal section medical attendance is included."

Aside from these two Washington cases, which uniformly hold that the state is not privileged to interfere with non-emergency medical care of infant citizens against the wishes of their parents, a search of the case law has revealed only one other authoritative decision refusing to order non-emergency medical care, and that is *In re Seiferth.*[25] In this case, the father of a boy who was 19 years of age and afflicted with a massive hairlip and cleft palate, arbitrarily refused to allow surgery due to a belief in mental healing. The father had inculcated the boy with a fear of surgery, and after careful consideration the boy himself said that he would prefer to wait. Operations such as this are normally performed between the ages of one to three years, and it was already too late to close the front portion of the cleft. However, there was no finding that there would be any advantage other than psychological in performing the operation presently rather than waiting for the boy to decide for himself.

The trial court, after stating that an order for surgery would have been granted without hesitation if the proceeding had been instituted prior to the child's acquiring convictions of his own, stated that no operation would be ordered due to the difficulty in securing the child's cooperation in post-operative rehabilitation. The appellate court reversed and ordered surgery, and the Supreme Court of New York, in a four-three decision, dismissed the petition on the same grounds as the trial court had dismissed it.

A dissenting opinion reasoned that the child's consent was not necessary or material by either statute[26] or decision, and that the child, obviously under the influence of his father, should not be allowed to "ruin his life and any chance for a normal, happy existence; normalcy and happiness . . . will unquestionably be impossible if the disfigurement is not remedied."

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[25] 127 N.Y.S. 2d 63, rev'd., 284 App. Div. 221, 137 N.Y.S. 2d 35 (1955).

[26] New York Children's Court Act (1922) § 2, subd. 4, defines a "neglected child" as "* * * a child * * * (e) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child."

Argument in Favor of Extending the Privilege to Non-Emergency Medical Care

"It is the particular genius and strength of the common law that no decision is *stare decisis* when it has lost its usefulness in our social evolution; it is distinguished, and if times have sufficiently changed, overruled. Judicial opinions do not always preserve the social statistics of another generation." [27] And so it is that, instead of being strictly construed as statutes in derogation of the common law generally are, child neglect statutes should ". . . be liberally construed to read the purpose of [their] enactment." [28]

The oldest case discovered which arose under a civil child neglect statute is *Heinemann's Appeal.*[29] This case arose under an early nonpenal child neglect statute,[30] providing that:

> . . . Whensoever any husband or father . . . shall neglect or refuse to provide for his child or children . . . the proper court may appoint a guardian of such children.

The case arose from an appeal by the father from a decree awarding custody of his two children, five and eight years of age, to their maternal grandmother. Sometime prior to this action, the oldest child of the respondent had died. Five days thereafter, his wife had died, and shortly thereafter, a second child had died. Some months after the death of his second child, the youngest child had died, leaving just the two remaining children. All of these members of the plaintiff's family had died of diphtheria, and in each instance the father had notice of the seriousness of the illness but never called a doctor "till death was at the door." Instead, he treated them himself by the "Bannscheidt system," which "consisted of pricking the skin of the patient on different parts of the body with an instrument composed of about 30 needles, and operated by a spring, and then rubbing the parts thus pricked with an irritating oil." The father explained his failure to call a doctor by simply stating that he ". . . had not entire faith in the infallibility of the old school of physicians."

Even though the remaining two children were not sick, and even though the court could have waited until medical attention was necessary, the lower court decree awarding custody of the two children to their maternal grandmother was affirmed. The court reasoned that neglect to provide for the children included failure to provide proper medical

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[27] Carroll v. Electrical Workers, 133 N.J. Eq. 144, 31 A. 2d 233 (Ct. of Chan. 1943).

[28] 43 C.J.S., Infants § 98; State v. Robertson, 13 S.W. 2d 566 (Mo. App. 1929).

[29] 96 Pa. 112, 42 Am. Rep. 532 (Ct. of App. 1880).

[30] Third Section of the Pennsylvania Act of May 4, 1955, Pamph. L. 430, Pwd. Dig. 411.

care, and that there was no reason to believe that the father would provide proper medical attendance if the children did become ill.

Demonstrating the coercive effect of the early penal child neglect statutes in non-emergency cases is *Oakley v. Jackson.*[31] The infant involved in this case was suffering from adenoids, which were causing mental dullness, impaired breathing, deafness, and some anemia. The operation was not of a serious nature, although it would probably necessitate anesthetic, but the parents nevertheless refused removal of the adenoids. The court found the parents guilty under the Children Act of 1908,[32] reasoning that:

> . . . The question is one of fact to be decided in each case on the evidence, and the Justices in deciding that question must take into consideration *the nature of the operation and the reasonableness of the parents' refusal to permit it.* (emphasis added)

The next attempt to establish the state's privilege to interfere with corrective medical care of infants over the objections of their parents is *In re Vasko.*[33] A two-year old child was suffering from glioma of the retina of the left eye, which had permanently blinded the left eye, and the growth was probably malignant. Removal of the eye was recommended by physicians, who said that the malignancy would eventually cause the eye to burst and that there was no doubt that the child would die of it sometime in the future if the operation was not performed. However, the court made no findings as to the urgency of the operation. Statistics showed a cure in about fifty per cent of the cases, but the parents arbitrarily refused the operation. It was the first time that the Appellate Court of the State of New York was called upon to decide if parental refusal to have corrective surgery performed was child neglect under the Children's Act of New York of 1922, which provided the first affirmative statutory power in New York to exercise direct control over the physical welfare of children rather than indirect control by punishment of the parents.

In reaching its decision that such failure to provide corrective medical care constituted neglect and conferred upon the state the privilege of interfering to have the operation performed, the court stated:

> The law is not only zealous in the protection of the civil rights of infants but has a special regard for the moral care, training and guidance of children . . . *its beneficence extends also to conservation of the health of children,* their physical well-being, *as well as to the preservation of their lives.* (emphasis added).[34]

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[31] 1 K.B. 216 (1914).

[32] *Supra* note 10.

[33] 238 App. Div. 128, 263 N.Y. Supp. 552 (1933).

[34] Id. at 553-554.

Closely following *In re Vasko,* but arising under a city ordinance,[35] rather than under the Children's Act of New York of 1922, is *In re Rotkowitz.*[36] This case involved a ten-year old child, the father of whom opposed an operation to correct and prevent extension of a leg deformity induced by poliomyelitis. The mother of the child brought a petition charging the father with neglect. The court expressly found the child to be neglected by the father, relying upon the opinion of Mr. Justice Hagarty in *In re Vasko,* and stating that it was "entirely in accord with those views." The court then concluded that:

> . . . it was the intention of the legislature to give power to the Justices of this Court to order an operation *not only in an instance where the life of the child is to be saved but also in instances where the health, the limb, the person or the future of the child is at stake.*[37] (emphasis added)

Still another leading case asserting the state's privilege to interfere with corrective medical care of its infant citizens is *Mitchell v. Davis.*[38] This case involved a 12-year old boy who was afflicted with pain and impaired movement from arthritis or complications following rheumatic fever, whose father was deceased, and whose mother refused to consult regular physicians and relied solely on home remedies and faith healing. In deciding that the mother's actions constituted "child neglect" within the meaning of the Texas statute, the court looked upon providing faith healing as providing no medical attention.

It may be appreciated that this case asserted not only the privilege of the state to order corrective medical care of its infant citizens when their parents refused to do so, but even went so far as to rule that the corrective medical care provided by the parent must be of a certain type.[39]

Perhaps the most far-reaching corrective medical care case is *In re Carstairs,*[40] in which the court ordered psychiatric examination of a child over the objections of its parents. The court held that the parents were obliged to furnish more than just the necessaries of life, including medical care, and that child neglect includes:

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[35] Section 85 of Domestic Relations Court Act, Laws 1933, c. 482, of the City of New York, which reads in part:

> Whenever a child within the jurisdiction of the court and under the provisions of this act appears to the court to be in need of medical or surgical care a suitable order may be made for the treatment of such child in its home, in a hospital or other suitable institution.

[36] 175 Misc. 948, 25 N.Y.S. 2d 624 (Dom. Rel. Ct. 1941).

[37] Ibid., at 951, 25 N.Y.S. 2d at 627.

[38] 205 S.W. 2d 812 (Tex. Civ. App. 1947).

[39] See also Heineman's Appeal, *supra,* note 29.

[40] 115 N.Y.S. 2d 314 (Dom. Rel. Ct. 1952).

> . . . *a failure to care, to look after, to guide, to supervise,* and I might even go just one word beyond that—to direct the activities of a child which will not destroy the child and will not be a menace to others . . . when a parent is apprised of the conduct of the child . . . and does nothing about correcting that conduct that would constitute neglect.[41]

This is the farthest reaching definition of "neglect" which would invoke a state's privilege to interfere with medical care of an infant that research has revealed.

Perhaps the criticism levied against such parents who fail to provide their children with proper corrective medical care has never been so gracefully phrased as when this court said:

> In the Bible it is said—and I say this in the light of what I have already said,—that this woman is not to be formally charged with a crime—that if you are warned of the acts of even a dumb animal and you take no precautions to prevent the dumb animal from repeating that conduct, *you are charged with the acts of the dumb animal.* I know the language of the Bible, but I would rather paraphrase it, and I do so. (emphasis added)[42]

Conclusions

Since the common law confers no privilege upon the state to interfere with non-emergency medical care of infant citizens against the wishes of their parents, and since this privilege is conferred only by statutes enacted under the police power of the individual states, the problem of when the statutory privilege may be invoked becomes one of interpretation of each individual state statute. For this reason, it becomes difficult to draw any broad generalities as conclusions. However, even in light of this difficulty, and since the statutes are rather uniform in scope and effect if not in wording, a few rather general conclusions may cautiously be drawn.

It is now almost axiomatic that a good faith religious belief is no defense to failing to provide corrective or preventive medical attention to infant children. This rule may be narrowed somewhat by the further conclusion that, although a forceful argument can be presented to the contrary, faith healing will not suffice as adequate medical attendance, except in a few eastern states where such beliefs are more widely held.

A good understanding of the current state of the law is found in *Morrison v. State.*[43] Although this case involved an emergency blood transfusion rather than non-emergency medical care, its reasoning is nevertheless applicable to this discussion:

> The only real difference, in principle, between that case [*In re Hudson*] and this, is that in the *Hudson* case the operation was ex-

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41 Ibid., at 316.

42 Id., at 317.

43 252 S.W. 2d 97 (Mo. App. 1952).

tremely dangerous to life, whereas the giving of a blood transfusion is attendant with a minimum of danger. However, the Washington court based its decision on the theory that the state had no power to order medical treatment for an infant against the wishes of its parents. *Where the proposed treatment is dangerous to the life, or where there is a difference in medical opinion as to the efficacy of a proposed treatment, or where medical opinion differs as to which of two or more suggested remedies should be followed, requiring the exercise of a sound discretion, the opinion of the parents should not be lightly overriden. . . .* The *Hudson* decision was by a divided court: three Judges concurring, one concurring in the result, and three vigorously dissenting. The dissenting opinion is forceful and well reasoned. We decline to follow that decision. (emphasis added).[44]

Viewed in the light of this reasoning from *Morrison v. State*,[45] the law begins to look a little more clear. The reasoning in *In re Hudson*[46] and the cases that followed it has received little or no support from any jurisdiction other than Washington.[47] On the other hand, the arguments in favor of extending the statutory privilege to non-emergency medical care have been resounded and adopted by many authoritative jurisdictions. Therefore, it is suggested that a state has what may be termed a *"discretionary privilege"* to interfere with non-emergency medical care of infant citizens without the consent of their parents.

This discretionary privilege is, by its very nature, an interference with an extremely personal and delicate relationship, and it must be invoked only with extreme caution. The task of drawing inflexible rules that must be complied with in each and every case to invoke the privilege approaches the impossible as well as the undesirable, due to the great variance of facts and circumstances from case to case. However, conclusions relating to certain factors or elements that may be helpful in deciding when this statutory discretionary privilege should be invoked can be properly drawn from this analysis if accompanied by the caution that the relative importance of each factor or element may vary substantially from case to case, again depending upon the particular facts and circumstances involved. In view of this caution and the comments that have been presented hereinbefore, it is submitted that these factors are: (1) the probable adverse consequences to the infant and to others of refraining to invoke the privilege; (2) the probability of the operation materially improving the child's condition; (3) the reasonable choice of the parent(s) in any discretionary matters; (4) the degree of danger and uniformity of competent medical opinion regarding the proposed treatment; and (5) the need for and availability of cooperation of the child.

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[44] Ibid., at 102.

[45] Id.

[46] *Supra* note 21.

[47] Note, *op. cit. supra* note 4 at footnote 21.